LIM BENG

v.

BISTARI CORPORATION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-49-1998]
10 DECEMBER 1999

CIVIL PROCEDURE: *Pleadings - Statement of claim - Striking out - Sale and purchase of land - Land charged to bank - Refusal to pay balance purchase price pending disclaimer letter from chargee Bank - Whether a plain and obvious case for striking out - Rules of the High Court 1980, O. 18 r. 19(1)(b) or (d)*

By a sale and purchase agreement dated 3 August 1995 ('S & P agreement'), the plaintiff agreed to purchase a piece of land ('the said plot') from the defendant for RM4.7 million. The plaintiff paid 10% of the purchase price for the land, but did not pay the balance sum within the stipulated time. Be that as it may, by letter dated 2 November 1995, the plaintiff informed the defendant that he would pay the balance purchase price subject to new terms, including, *inter alia,* that the defendant obtain a letter of disclaimer from the Bank of Commerce, the chargee of the said plot. The defendant agreed to comply with the new terms, but had somehow failed to obtain any disclaimer in favour of the plaintiff from the Bank of Commerce. The plaintiff refused to pay the balance purchase price, and that being so, on 28 May 1996, the defendant terminated the S & P agreement and forfeited the RM470,000 deposit. The plaintiff sued the defendant, apparently for specific performance, and the defendant retorted by applying to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(b) or (d) Rules of the High Court 1980 ('encl 7'). On 19 November 1999 the learned senior assistant registrar heard encl 7 and allowed the defendant's application. Dissatisfied, the plaintiff appealed.

Held:

[1] It took the defendant one year three months and 25 days to file encl 7 after the filing of the statement of claim, one year one month and 23 days to file encl 7 after the filing of the statement of defence, and one year two months and 16 days to file encl 7 after the filing of the memorandum of appearance. It was certainly not an exercise in promptitude when the defendant filed encl 7.

[2] The Bank of Commerce did not bind itself to the plaintiff as far as the letter of redemption dated 27 November 1995 is concerned. That being so, the said plot was still mortgaged to the Bank of Commerce, and in the event the defendant failed to service its loan to the Bank, there was no bar for the latter to auction off the said plot. Clearly, therefore, the plaintiff was afraid to be a victim of circumstance and eventually lose out under the S & P agreement. As an innocent purchaser for value with notice of the charge on the said plot, the plaintiff's position is weak as against the Bank of Commerce, the registered chargee.

[3] There was no tripartite agreement between the plaintiff and the defendant and the Bank of Commerce to enable the plaintiff to make direct payment of the balance purchase price to the Bank of Commerce. Instead there was only a S & P agreement between the plaintiff and the defendant without the involvement of the Bank of Commerce. Further, there was no written consent obtained by the defendant from the Bank of Commerce before the sale of the said plot was effected in favour of the plaintiff. There was therefore reason for the plaintiff's fear that, should the defendant default in its loan to the Bank of Commerce, the said plot would be auctioned off by an order for sale, and the plaintiff would be left without any remedy. This was certainly not a plain and obvious case for striking out. It was not a case that can be considered as clear beyond doubt to justify striking out.

[Appeal allowed; case remitted for hearing in open court.]

Case(s) referred to:

AG of Duchy of Lancaster v. L & NW Ry [1892] 3 Ch 274 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(refd)***

Buxton & Anor v. Supreme Finance (M) Bhd [1992] 2 MLJ 481 ***(refd)***

Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 3) [1970] Ch 506 ***(refd)***

Cross v. Earl Howe 62 LJ Ch 342 ***(refd)***

Drummond – Jackson v. British Medical Association [1970] 1 WLR 688 ***(refd)***

Electrical Co v. Attorney General for Ontario [1919] AC 687 ***(refd)***

Fletcher v. Bethom 68 LT 438 ***(refd)***

Hubbuck v. Wilkinson [1899] 1 QB 86 ***(refd)***

Kellaway v. Bury [1892] 66 LT 599 ***(refd)***

L'Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(dist)***

Lea v. Thursby [1904] 90 LT 65 ***(refd)***

Metropolitan Bank v. Pooley 10 App Cas 210 ***(refd)***

Nagle v. Feilden [1966] 2 QB 633 ***(refd)***

Paul Murugesu Ponnusamy v. Cheok Toh Gong [1996] 2 CLJ 297 ***(refd)***

Pao On & Ors v. Lau Yiu Long & Ors [1980] AC 614 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 ***(refd)***
Reichel v. Magrath 14 App Cas 655 ***(refd)***
Remmington v. Scoles [1897] 2 Ch 1 ***(refd)***
South Hetton Coal Co v. Haswell etc Co [1898] 1 Ch 465 ***(refd)***
Stephenson v. Garnett [1898] 1 QB 677 ***(refd)***
Tucker v. Collinson 34 WR 354 ***(refd)***
Wenlock v. Moloney [1965] 1 WLR 1238 ***(refd)***
Williamson v. London [1879] 12 Ch D 787 ***(refd)***
Wright v. Prescot UDC [1916] 115 LT 772 ***(refd)***
Wyatt v. Palmer [1899] 7 QB 106 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 256(3), 340(2)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the plaintiff - Megat Munir; M/s Leong & Megat
For the defendant - Dhyana Shila Vasanthan; M/s Raja Eleena Siew Ang & Assoc

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

The Facts

By a sale and purchase agreement dated 3 August 1995 entered into between the plaintiff and the defendant (hereinafter referred to as the "S & P agreement"), the plaintiff had agreed to purchase from the defendant and the defendant had agreed to sell to the plaintiff a piece of vacant land with an area of approximately 10,455 square feet (hereinafter referred to as the "said plot") for the price of RM4.7 million. The plaintiff has so far paid 10% of the purchase price amounting to RM470,000 but failed to pay the balance of the purchase price within the stipulated time period under the terms of the S & P agreement. By cl. 2 of the S & P agreement, the plaintiff was required to pay to the defendant the balance of the purchase price of the said plot amounting to RM4,230,000 within ninety (90) days from the date of the S & P agreement. Again, under cl. 2 of the S & P agreement, it provided that the defendant shall allow an extension of time of thirty (30) days from the expiry of the ninety (90) days to enable the plaintiff to settle the balance of the purchase price subject to the plaintiff paying interest of 10% per annum on the balance outstanding calculated on daily basis from the first day of the extended period to the actual day of payment.

By letter dated 2 November 1995, the plaintiff informed the defendant that the balance of the purchase price will only be released by the plaintiff subject to the new terms imposed by the plaintiff to be complied by the defendant. The new terms as incorporated by the plaintiff in that letter dated 2 November 1995 must be reproduced as its reproduction would enlighten us as to the factual matrix of the present appeal (see exhibit marked as "E3" of encl. 6):

LIM BENG

783A, Batu 4 1/2, Jalan Ipoh, 51200 Kuala Lumpur. Tel: 03-6266033, 03-6266358 Fax: 03-6211500

2 November 1995

Your Ref: RESAT/BISTARI/SPA/11318/95/1 (esm)

M/S RAJA ELEENA SIEW ANG & TAN
(Advocates & Solicitors),
Suite 2003, 20th Floor,
Plaza See Hoy Chan,
Jalan Raja Chulan,
50200 Kuala Lumpur.
Attn: Ms. Ang Saik Hoon

URGENT
BY FAX & BY POST
FAX: 03-2301613

Dear Sirs,

Re: Sale & Purchase Agreement Dated 3 August 1995
On Part of Lot 95, Section 46, Jalan Putra,
Kuala Lumpur.
Between Lim Beng & Bistari Corporation Sdn Bhd.

I refer to your letter dated 2 November 1995.

I have prepared a cheque for an amount being the balance of purchase price in your favour to be forwarded to you as (stakeholder) on behalf of your client Bistari Corporation Sdn Bhd pursuant to the above Agreement. The amount is RM3,264,550.00 based on the land area of 8,299 sq. ft. as certified by your client's land surveyor. The total purchase price should be RM3,734,550.00 pursuant to Clause 4. I have already paid RM470,000.00 upon signing the Agreement. Hence, the amount is the correct figure duly adjusted.

However, the stated land area is subject to the final figure shown in the subdivided title yet to be issued.

But I shall not release the payment to you until the following are in order:

(1) Execution of Power of Attorney in my favour by your client. Please forward a draft P.A. for my comments.

(2) The original copies of disclaimer letters from all chargee(s) as per Clause 3.4.

(3) Evidence of submission to relevant land authority for application of subdivided title.

(4) Satisfactory discharge letters of all professionals previously engaged by your client on the property we purchased from your client.

(5) Delivery of vacant possession. Please refer Clause 8.1 and Clause 8.2.

(6) Apportionment of quit rent yet to be determined.
Alternatively, we propose to immediately transmit the payment to our Solicitors to hold as (stakeholder) pending the above issues to be resolved. Please, let me hear from you soonest possible.

Thank you.

Yours faithfully,

Sgd. (Illegible).
Mr. Lim Beng
c.c. 1) Asahi Agency – BY FAX
2) Leong & Megat – BY FAX.

By letter dated 7 November 1995, the defendant responded and stated that any adjustment to the purchase price could only be done upon the issuance of the sub-divided title in accordance with the S & P agreement and requested the plaintiff to pay the balance of the purchase price because its payment was not conditional upon compliance with the new terms as imposed by the plaintiff. The letter dated 7 November 1995 was exhibited as exh. "E4" of encl. 6 and it was worded as follows:

RESAT/BISTARI/SPA/11318/95/1 (esm)

7th November 1995 **BY FAX VIA MAIL**
Fax no. 6211500

Mr. Lim Beng
No. 783A, Batu 4 1/2 URGENT
Jalan Ipoh
51200 Kuala Lumpur

Dear Sirs

Re: Sale and Purchase Agreement on part of Lot 95, Section 46, Between Bistari Corporation Sdn Bhd

We refer to your fax dated 2/11/95 to us.

Further thereto, we are instructed by our Vendor-clients to reply as follows:

a) The Balance sum of RM4,230,000.00 is due within 90 days from 3/8/95. Any adjustment of the Purchase Price is only to be made upon the issue of the Subdivided Title in accordance with Clause 4.1 of the Sale and Purchase Agreement.

b) Kindly effect payment of the Balance Sum at the time and in the manner as stated in Clause 2 as payment of the Balance Sum is not conditional upon the conditions stated in paragraph 5 of your letter.

Kindly make payment of the Balance Sum to us immediately failing which our clients shall enforce all rights under the Sale and Purchase Agreement arising from your breach.

Yours faithfully
Sgd. (Illegible).
ANG SAIK HOON (Ms)

c.c. Bistari Corporation Sdn Bhd – Attn: Mr Er Ah Huat

As spoken between your Mr Er and our Ms Ang, a copy of Lim Beng's letter dated 2/11/95 is enclosed.

/esm

It is germane to note that at the time the S & P agreement was entered between the parties, the sub-divided title to the said plot had yet to be issued.

The plaintiff was quite adamant. Despite the explanations given to the plaintiff by the defendant's solicitors in their letter dated 7 November 1995 as reproduced above, the plaintiff through his letter dated 8 November 1995 insisted on the performance of those new conditions. The plaintiff's letter dated 8 November 1995, as seen in exhibit marked as "E5" of encl. 6, was worded as follows:

LIM BENG

783A, Batu 4 1/2, Jalan Ipoh, 51200 Kuala Lumpur. Tel: 03-6266033, 03-6266358 Fax: 03-6211500

8 November 1995

Your Ref: RESAT/BISTARI/SPA/11318/95/1 (esm)

M/S: RAJA ELEENA SIEW ANG & TAN
(Advocates & Solicitors),
Suite 2003, 20th Floor,
Plaza See Hoy Chan, **BY FAX & BY HAND**
Jalan Raja Chulan, FAX: 03-2301613
50200 Kuala Lumpur.
Attn: Ms. Ang Saik Hoon

Dear Sirs,

Re: Sale & Purchase Agreement Dated 3 August 1995
On Part Of Lot 95, Section 46, Jalan Putra, Kuala Lumpur.
Between Lim Beng & Bistari Corporation Sdn Bhd.

I refer to your letter dated 7 November 1995.

I enclose herewith two photocopies of 2 **Banker's** cheques (MBB 012319 & MBB 012320) of total amount RM3,264,264,550.00 favouring M/s Raja Eleena Siew Ang & Tan, as evidence that I am ready to forward the original Banker's cheques to you. Please refer Clause 4.2 for the contractual amount.

Referring back to my earlier letter dated 2 November 1995, please note:

Item (1) It is contractually required immediately.

Item (2) It is contractually required immediately.

Item (3) I am not insistent on this as your client is obliged to show evidence within two weeks from the Completion Date.

Item (4) It is contractually required immediately.

Item (5) It is contractually required immediately. I need your Solicitors' confirmation of vacant possession in writing.

Item (6) May be irrelevant at this point of time.

I shall personally deliver the cheques without any delay after receiving your letter to confirm that Item (1), Item (2), Item (4) & Item (5) are in order.

Thank you.

Yours faithfully,
Sgd. (Illegible).

Mr. Lim Beng
c.c. 1) Asahi Agency – BY FAX
2) Leong & Megat – BY FAX.

and the photostat copies of the **banker's** cheques dated 8 November 1995 amounting to RM1,227,239.20 and RM2,037,310.80 were annexed thereto. The defendant replied by letter dated 9 November 1995 reaffirming their stand and this letter was exhibited as exh. "E6" of encl. 6 and it was worded thus:

RESAT/BISTARI/SPA/11318/95/1 (esm)
9th November 1995 **BY FAX VIA MAIL**
Fax no. 6211500

Mr. Lim Beng
No. 783A, Batu 4 1/2
Jalan Ipoh
51200 Kuala Lumpur

Dear Sirs

Re: Sale and Purchase Agreement on part of Lot 95, Section 46, Between Bistari Corporation Sdn Bhd

Your letter dated 8/11/95 has reference.

We are instructed to reply to Items 1 to 6 of your letter dated 8/11/95 as follows:

a) Item 1 – A draft of the Power of Attorney is enclosed for your approval. Please note that the Power of Attorney is also pending approval by our clients.

b) Item 2 – Clause 3.4 provides that the **Vendor will cause the Chargee to issue** the disclaimer letter **upon full payment.** Nowhere is it provided that the disclaimer letter is to be issued immediately.

c) Item 3 – Please note that Clause 3.1 provides that the application will be submitted by the Vendor to the relevant (authorities) within 14 days from the Completion Date. Our clients are not obliged under the terms of the Agreement to "show evidence" to you.

d) Item 4 – Our clients will inform you of the status of the same once payment of the Balance Sum is made.

e) Item 5 – Please note that Clause 8.2 provides that vacant possession will be delivered within 180 days of the Sale and Purchase Agreement.

Kindly effect payment in accordance with Clause 2 immediately failing which our clients shall enforce their full rights under the Sale and Purchase Agreement.

Yours faithfully

Sgd. (Illegible).
ANG SAlK HOON (Ms)

c.c. Bistari Corporation Sdn Bhd (Attn: Mr Er)
A copy of Lim Beng's letter dated 8/11/95 is enclosed for your records.
A draft of the Power of Attorney is enclosed for your approval.

The defendant was eager to complete the sale transaction and as a gesture of goodwill, the defendant complied with the new terms imposed by the plaintiff. The letter from the defendant's solicitors dated 6 December 1995 was self-explanatory and it was worded as follows (see exh. "E7" of encl. 6):

RESAT/BISTARI/SPA/11318/95/1 (esm)

6th December 1995
Mr. Lim Beng
No. 783A, Batu 4 1/2
Jalan Ipoh
51200 Kuala Lumpur

BY FAX VIA MAIL
Fax no. 6211500

Dear Sir

Re: Property: Part of Lot 95, Section 46, Jalan Putra Kuala Lumpur Between Bistari Corporation Sdn Bhd

We refer to the above matter.

We enclose herewith a copy each of the following documents for your attention:

a) Letter of Discharge dated 27/11/95 from Bank of Commerce to Bistari Corporation Sdn Bhd.

b) Acknowledgement from Pentadbir Tanah, Kuala Lumpur in respect of M/s Ukur Sekitar's letter dated 6/11/95 submitting the application for subdivision and surrender of Lot 95, 96, 97, 471 and 675, Section 46, Kuala Lumpur.

c) Letter of Discharge of M/s Arkitek Teknikarya dated 17/11/95. Bistari Corporation Sdn Bhd did not engage any other professionals to work on the aforesaid Land except Arkitek Teknikarya.

d) Quit rent receipt for year 1995.

Meanwhile, please revert on the Power of Attorney immediately together with the payment of the Balance Sum failing which our clients shall enforce their full rights under the Sale and Purchase Agreement.

Yours faithfully

Sgd. (Illegible).
ANG SAIK HOON (Ms)

and there was thus a variation of the S & P agreement unlike the case of *Paul Murugesu s/o Ponnusamy v. Cheok Toh Gong* [1996] 2 CLJ 297; [1996] 1 MLJ 843. Peh Swee Chin FCJ delivering the judgment of the then Supreme Court in *Paul Murugesu's* case *(supra)* said that the purchaser in that case had understood the variation the vendors had in mind, but nevertheless she had not intended to be bound by it. Consequently, his Lordship held that there was no consensus *ad idem* about the variation of cl. 3 and the purchaser could still fall back on cl. 3 in its original form. Thus, his Lordship continued to hold that the purchaser had not been in breach of cl. 3 because the obligation to pay the balance of the purchase price had not arisen prior to the receipt of the written notice as described in cl. 3. In the present appeal before me, the variation of the S & P agreement was in writing and it was an appeal from the decision of the SAR who allowed the defendant's application for striking out the statement of claim. The case of *Paul Murugesu (supra)* emanated from the High Court at Seremban and it revolved on the nature of the evidence that was required to prove consent to a variation of a term of an agreement. Be that as it may, the defendant's solicitors had by letters on behalf of the defendant requested the plaintiff to pay up the balance of the purchase price.

These letters were dated 17 January 1996, 5 February 1996, 27 March 1996 and 17 May 1996 and they were collectively exhibited and marked as exh. "E8" of encl. 6. The letter dated 17 May 1996 was of great significance and it should be reproduced and I now produce it:

RESAT/BISTARI/SPA/11318/95/1 (esm)

17th May1996

BY FAX VIA HAND
Fax no. 6211500

Mr Lim Beng
No. 783A, Batu 4 1/2
Jalan Ipoh
51200 Kuala Lumpur

No of pgs faxed incl front pg: 1 only

Dear Sir

Re: Property: Part of Lot 95, Section 46 Jalan Putra Kuala Lumpur
Vendor: Bistari Corporation Sdn Bhd

We refer to our numerous letters dated 17/1/96, 16/3/96 and 27/3/96 requesting for payment of the balance of the purchase price from you. To date, our clients have not received the aforesaid sum or any part thereof from you.

Pursuant to Clause 2 of the Sale and Purchase Agreement dated 3/8/95 ("Agreement"), the balance of the purchase price amounting to RM4,230.000.00 should have been paid to our clients within ninety (90) days from the date of the Agreement or the extended Completion Date as defined in the Agreement.

As a result of your failure to pay the balance of the purchase price within the stipulated time, you are in breach of the Agreement.

TAKE NOTICE that unless the balance of the purchase price amounting to RM4,230,000.00 is paid to our clients or to us as stakeholders within seven (7) days from the date hereof, **making time the essence of the contract,** this Agreement shall automatically be terminated without further notice to you upon the expiry of the Agreement and the deposit paid pursuant to the Agreement shall be absolutely forfeited by our clients.

Yours faithfully

Sgd. (Illegible).
SIEW YEOW WAN
c.c. Bistari Corporation Sdn Bhd
(Attn: Mr Er Ah Huat/Candice)

The plaintiff acted nonchalantly and ignored the letter dated 17 May 1996. Despite the fact that the defendant had complied with all the new conditions imposed by the plaintiff, there was still failure and neglect to pay the balance of the purchase price. The defendant had by letter dated 28 May 1996 terminated the S & P agreement and forfeited the sum of RM470,000 under cl. 5.1 of the S & P agreement thereof. That letter of termination dated 28 May 1996 can be seen in exh. "E9" of encl. 6 and it was worded as follows:

RESAT/BISTARI/SPA/11318/95/1 (esm)

28th May 1996 **BY FAX VIA HAND**
Fax no. 6211500

Mr Lim Beng
No.783A, Batu 4 1/2
Jalan Ipoh
51200 Kuala Lumpur

No of pgs faxed incl
front pg: one only

Dear Sir

Re: Property: Part of Lot 95, Section 46, Jalan Putra Kuala Lumpur
Vendor: Bistari Corporation Sdn Bhd

We refer to our notice dated 17/5/96 to you.

You have to-date failed to pay the balance sum of the purchase price to our clients or to us as stakeholders within the notice period given.

We write to notify you that the Sale and Purchase Agreement dated 3/8/95 has been terminated upon the expiry of the said notice and the deposit paid has been absolutely forfeited by our clients.

Yours faithfully

Sgd. (Illegible).
ANG SAIK HOON (Ms)
c.c. Clients (Attn: Mr Er Ah Huat)
/esm.

The Application In Enclosure 7

It was for these reasons, that the defendant filed encl. 7 to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(b) or (d) of the Rules of High Court 1980 ("RHC"). That order is worded thus (the relevant parts only):

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(b) it is scandalous, frivolous or vexatious; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

In its original text, the prayers sought for in encl. 7 were worded as follows:

(i) bahawa Pernyataan Tuntutan bertarikh 21hb Januari, 1998 yang difailkan oleh Plaintif dibatalkan di bawah Aturan 18 Kaedah 19 dalam Kaedah-Kaedah Mahkamah Tinggi 1980 dan di bawah bidang kuasa sedia ada Mahkamah atas alasan-alasan bahawa:

(a) Ia mengaibkan, remeh atau menyusahkan; atau

(b) Ia selainnya adalah satu penyalahgunaan proses Mahkamah:

(ii) kos permohonan ini ditanggung oleh Plaintif; dan

(iii) lain-lain relif atau perintah selanjutnya yang difikirkan wajar dan sesuai diberikan oleh Mahkamah Yang Mulia ini.

The senior assistant registrar ("SAR") heard encl. 7 on 19 November 1999, and allowed the defendant's application in encl. 7 with costs. Aggrieved by the decision of the SAR, the plaintiff filed an appeal to the judge-in-chambers in encl. 12.

An Examination Of The Law And The Facts

The rule on striking out (referring to O. 18 r. 19(1)(b) or (d) of the RHC) is a draconian rule as it gives a wide power to the court, beyond imagination, to simply strike out pleadings and indorsements summarily. Under it, the court is empowered:

(1) by a summary process, without a trial, to stay or dismiss an action or enter judgment against the defendant; and

(2) to strike out any pleading which contains any matter which is scandalous, frivolous or vexatious or otherwise an abuse of the process of the court.

Now, apart from this rule, the court too has an inherent jurisdiction to stay or dismiss an action, or to strike out pleadings which are vexatious or frivolous, or, for that matter, an abuse of the process of the court. (*Reichel v. Magrath* 14 App. Cas. 655; *Remmington v. Scoles* [1897] 2 Ch. 1, CA; and *Stephenson v. Garnett* [1898] 1 QB 677). Of course, in exercising its inherent jurisdiction, the court will thread cautiously and will, with considerable vigour, protect itself from abuse (*Metropolitan Bank v. Pooley* 10 App. Cas. 210).

The rule expressly states that the application for striking out may be made "at any stage of the proceedings" but it would be a good practice to make the application promptly and as a rule before the close of pleadings. If the defendant seeks to launch an attack on the statement of claim, the application for striking out may be made before the statement of defence is served (*A.G.*

of Duchy of Lancaster v. L. & N.W. Ry. [1892] 3 Ch 274). If the defendant seeks to stay or dismiss the action, the application to strike out must be made after service of the statement of claim (*Wright v. Prescot U.D.C.* [1916] 115 LT 772; and *Electrical Co. v. Attorney General for Ontario* [1919] AC 687). On the other hand, where the plaintiff seeks to attack the statement of defence, the application should be made as soon as practicable after the service of the defence. In seems that Brett MR in *Tucker v. Collinson* 34 WR 354 was of the view that the plaintiff may proceed to strike out even after the pleadings were closed. But, the application of the plaintiff to strike out would definitely be refused after the action has been set down for trial (*Cross v. Earl Howe* 62 LJ Ch. 342; *Fletcher v. Bethom* 68 LT 438).

The law books are replete with authorities on striking out. The application to strike out must be drafted with precision. It must be precise and state with exactitude (*Williamson v. London* [1879] 12 Ch. D 787, 790). A party must indicate what he wants to strike out (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 3)* [1970] Ch. 506).

Now, the statement of claim in the present appeal as seen in encl. 1 was dated 21 January 1998, while the writ of summons was dated 23 January 1998 and it was filed together with the statement of claim on 23 January 1998. The statement of defence was dated 25 March 1998 and it was filed on the same day as seen in encl. 3. The application to strike out the statement of claim as seen in encl. 7 was dated 18 May 1999 and filed on the same day. Messrs Raja Eleena Siew Ang & Tan, advocates and solicitors, filed a memorandum of appearance for the defendant on 2 March 1998 as seen in encl. 2. A notice of change of solicitors for the plaintiff in encl. 5 was filed by Messrs Leong & Megat as solicitors to replace Messrs Francis Goh, Alvin John & Co. Unfortunately, there was nothing in the court file to show (1) when the statement of claim was served on the defendant and, (2) when the statement of defence was served on the plaintiff. Be that as it may, using the period when encl. 7 was filed as a barometer and that was on 18 May 1999, the following calculations would come in handy and would certainly give a general perspective of the whole case:

(1) Calculation wise from 23 January 1998 to 18 May 1999, it took the defendant one year three months 25 days to file encl. 7 after the filing of the statement of claim.

(2) Calculation wise from 25 March 1998 to 18 May 1999, it took the defendant one year one month 23 days to file encl. 7 after the filing of the statement of defence.

(3) Calculation wise from 2 March 1998 to 18 May 1999, it took the defendant one year two months 16 days to file encl. 7 after the filing of the memorandum of appearance in encl. 2.

and from these brief recitals, it took one year odd for the defendant to decide to file encl. 7. It was certainly not an exercise in promptitude when the defendant filed encl. 7.

Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86 at p. 91 observed that it was only in plain and obvious cases that recourse should be had to the summary process under this rule. And when a claim or an answer to the claim is on the face of it "obviously unsustainable", the summary procedure can readily be put into motion (*A.G. of Duchy of Lancaster v. L & NW Ry. Co. (supra)*). Danckwerts LJ in *Nagle v. Feilden* [1966] 2 QB 633 at p. 648, 651 and Salmon LJ in *Drummond – Jackson v. British Medical Association* [1970] 1 WLR 688, [1970] 1 All ER 1094 were at tangent with one another and they both held the views that the summary remedy under this rule can only be applied in plain and obvious cases and when the case was unarguable. The court too cannot proceed on a frolic of its own and be too meticulous in its approach when confronted with an application under this rule. A minute and protracted examination of the documents and the facts of the case cannot be adopted in order to see and ascertain whether the plaintiff really has a cause of action (*Wenlock v. Moloney* [1965] 1 WLR 1238, [1965] 2 All ER 871, CA). In short, the powers under this rule will only be exercised when the case is clear beyond doubt (see the speech of Lindley LJ in *Kellaway v. Bury* [1892] 66 LT 599, 602). The court too must be satisfied that:

(1) there is no reasonable cause of action (*South Hetton Coal Co. v. Haswell, etc., Co* [1898] 1 Ch. 465); and

(2) that the proceedings contemplated by the plaintiff are not scandalous, frivolous or vexatious (*Wyatt v. Palmer* [1899] 7 QB 106; *Lea v. Thursby* [1904] 90 LT 65).

Basically, encl. 7 was an application to strike out the statement of claim and on the authority of *Wenlock v. Moloney (supra)*, it was not permissible for me to try the action on affidavits when the facts and issues were in dispute.

Mr. Megat Munir, learned counsel for the plaintiff, submitted that there was only one main reason why the plaintiff was reluctant to pay the balance of the purchase price. It pivoted on the defendant's reluctance to obtain the letter of redemption from the Bank of Commerce in favour of the plaintiff. In encl. 8, in exh. "LB1" a letter of redemption of the said plot was addressed to the defendant from the Bank of Commerce. That letter was dated 27 November 1995 and it was worded as follows:

BANK OF
COMMERCE

OUR REF : 40/OT-0195(B)/95

DATE : November 27, 1995

Messrs Bistari Corporation Sdn Bhd
Ground Floor, IGB Plaza
No. 6, Jalan Kampar
50400 Kuala Lumpur
ATTENTION : MR ER AH HUAT

Dear Sir,

RE: REDEMPTION SUM FOLLOWING THE DISCHARGE OF LOT 95

We refer to your letter dated November 8, 1995 pertaining to your request for the redemption sum on the above parcel of land which has been sold recently to a Mr Lim Beng. We would like to inform you that we are agreeable to the discharge of Lot 95 without any redemption sum.

Thank you and assuring you of our best services at all times.

Yours faithfully

for BANK OF COMMERCE
Sgd. (Illegible).
M. KUNASELAN
BRANCH MANAGER.

and from the tenor of that letter, Bank of Commerce did not bind itself to the plaintiff as far as the letter of redemption was concerned. In other words, the said plot was still mortgaged to the Bank of Commerce and in the event the defendant failed to service its loan to the Bank of Commerce, there was no bar for the said bank to auction off the said plot. It was this nagging fear that prevented the plaintiff from paying the balance of the purchase price even though the plaintiff was in a position to pay that money.

In the S & P agreement, the defendant was described as the registered proprietor of all those pieces of lands held under Geran 13844, Lot 47, Geran 13845, Lot 95, CT 1441 Lot 96, CT 14442, Lot 97 and H.S. (D) 77206 PT 62 – all in Bandar Kuala Lumpur, Wilayah Persekutuan. All these pieces of lands were on the date of the S & P agreement described as being charged to the Bank of Commerce and these pieces of lands had been approved for development by the Dewan Bandaraya Kuala Lumpur. The said plot which the plaintiff purchased was part and parcel of Lot 95. Incidentally, the defendant has since put up its tower blocks of condominiums on these pieces

of lands and these condominiums were the ones that now stand proudly next to the Mall in Kuala Lumpur. Very imposing condominiums. Clause 3.4 of the S & P agreement reads as follows:

> Upon full payment of the purchase price by the purchaser (plaintiff) to the vendor (defendant), the vendor (defendant) will cause the chargee (Bank of Commerce) to issue a disclaimer letter disclaiming all rights to the plot.

and this meant that the plaintiff must pay the balance of the purchase price before the Bank of Commerce as the chargee would issue a disclaimer letter disclaiming all rights to the said plot. The plaintiff was afraid to be a victim of circumstance and eventually lose out under the S & P agreement. As an innocent purchaser for value with notice of the charge on the said plot, the plaintiff's position would be weak as opposed to the Bank of Commerce who were the registered chargees. The then Supreme Court in *Buxton & Anor v. Supreme Finance (M) Berhad* [1992] 2 MLJ 481 had occasion to consider the interest of a registered chargee as opposed to that of a *bona fide* purchaser for value with or without notice of the charge. In that case, a housing developer, the registered owner of a piece of land had obtained a loan from a finance company and had charged the land to the finance company. The housing developer as the chargor built apartments on that piece of land and sold the apartments to purchasers, among whom were the appellants. The full purchase price of the apartments were paid for by the appellants. The housing developer as the chargor failed to repay the loan to the finance company – the chargee. The finance company then applied for an order for sale of that piece of land and in that application the finance company excluded some apartments, but not the apartments of the appellants. No written consent of the finance company had been obtained by the housing developer in respect of the sale of the apartments to the appellants. The appellants were granted leave to intervene in the application but the appellants' objections were dismissed and the High Court ordered the sale of the property. The appellants appealed to the then Supreme Court and the appellants contended that they were entitled to succeed as the circumstances showed cause to the contrary under s. 256(3) of the National Land Code 1965. The Supreme Court dismissed the appeal by the appellants and held, *inter alia*, that as no written consent was obtained by the housing developer from the finance company before the sale of the apartments to the appellants pursuant to cl. 13 of the annexure to the charge, it could not confer any right or interest in the appellants as against the finance company. The Supreme Court further held that since the appellants had executed the sale and purchase agreements with notice of the charge, they must accept the purchase subject to the registered charge. The appellants should have protected their interests with a caveat or entered into a tripartite agreement with the housing developer and the finance company to make direct payments to the finance company as did the purchasers of the other apartments

which were excluded from the sale. The Supreme Court held that the appellants had not satisfied the court of the existence of cause to the contrary to justify withholding an order for sale at the instance of the finance company – the registered chargee. Harun Hashim SCJ (as he then was), delivering the judgment of the then Supreme Court had this to say at p. 487 to 488 of the report:

> The issue as to the rights of an innocent purchaser for value, with or without notice of the charge as against a registered chargee has been considered by the courts and is now settled law: see eg *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81; *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54; *Perwira Habib Bank (M) Bhd v. Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447. In all these cases, it was held that the interest of a registered chargee is indefeasible by s. 340(1) of the Code unless it is made defeasible by s. 340(2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the chargor and the chargee to defeat the interest of a third party. The interest of a *bona fide* purchaser for value cannot prevail over that of a registered chargee. As was said by Lord Oliver in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn & Anor* [1989] 1 MLJ 457 at p. 460:
>
> > Even assuming – a point which does not arise in the instant case and has not been argued – that this section (340 of the Code) might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish 'a cause to the contrary' for the purposes of s. 256.
>
> In the present case, the appellants accept the indefeasible title of the respondent. They executed the sale and purchase agreements with notice of the charge and they must accept the purchase subject to the registered charge. They should have protected their interests with a caveat or entered into a tripartite agreement with the chargor and the respondent to make direct payments to the respondent as did the purchasers of Apartments 5A, 5B, 8A and 8B. We sympathize with their plight but we must hold that in the circumstances of this case they have not satisfied the court of the existence of cause to the contrary to justify withholding an order for sale at the instance of the registered chargee respondent.

Now, in the context of the present appeal there was no evidence of a tripartite agreement between the plaintiff and the defendant and the Bank of Commerce to enable the plaintiff to make direct payment of the balance of the purchase price to the Bank of Commerce. Instead there was only a S & R agreement between two parties – between the plaintiff and the defendant without the involvement of the Bank of Commerce. Furthermore, there was no written consent obtained by the defendant from the Bank of Commerce before the

sale of the said plot was effected in favour of the plaintiff. In the event the defendant defaulted in its loan to the Bank of Commerce the said plot would be auctioned off by an order for sale and the plaintiff would be left, high and dry, so to speak – bereft of any remedy. This was the fear of the plaintiff. It was certainly not a plain and obvious case for striking out. It was not a case that can be considered as clear beyond doubt to justify striking out. These were my judgments and I so hold accordingly.

There is no requirement under the law that prior to the creation of the charge over the said plot which was part and parcel of Lot 95, the Bank of Commerce was obliged to ascertain whether the said plot has been sold or not. An omission on the part of the Bank of Commerce to make such an enquiry, could not constitute fraud within the framework of s. 340(2) of the National Land Code 1965. An authority for these propositions can be found in the case of *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad (formerly known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; [1996] 2 AMR 1537.

In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, Mohamed Dzaiddin SCJ delivering the judgment of the court reiterated the law on striking out in fine language. This was what his Lordship said at p. 43 to p. 44 of the report:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously, unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd (supra)*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
>
> After considering the counterclaim and the defence to counterclaim, we are satisfied that both pleadings have raised some issues which require serious discussion. The appellants alleged that the respondent owed them a legal duty of care which arose from an agreement to sell the public-quoted shares belonging to the appellants and, that as a result of unreasonable delay in granting the approval to sell, they have suffered loss and damage. The respondent, on the other hand, denied that a duty of care existed between them.

> Furthermore, there is also a dispute on fact concerning the alleged agreement on 27 March 1990. The respondent maintained that there was no concluded agreement reached between the parties on 27 March 1990. Here, the parties relied on the correspondence in the respective affidavits filed in the action. This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v. Lawson* [1915] 31 TLR 418 and *Wenlock v. Moloney & Ors (supra)*).
>
> Bearing in mind the established principles stated above, we say that this is not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. Nor can we say that they are frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court. Accordingly, we dismiss both appeals with costs.

Siti Norma Yaacob JCA in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 310 at p. 320 to p. 321 of the report, had this to say of O. 18 r. 19 of the RHC:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890.)

and the facts of the present appeal, as highlighted, can never be considered as plain and obvious.

Not to be outwitted, Miss Dhyana Shila, learned counsel for the defendant, argued that upon signing the S & P agreement both the parties were bound by what they had signed and she relied heavily on the case of *L'Estrange v. F. Graucob, Limited* [1934] 2 KB 394. That case can easily be distinguished from the present appeal. That was a case classified as a sale of goods. It was a case where the buyer of an automatic slot machine signed and handed to the sellers an order form containing in ordinary print and writing the essential terms of the contract; and in small print certain special terms one of which

was "any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded." The sellers thereupon signed and handed to the buyer a printed order confirmation assenting to the terms in the order form. The machine was delivered by the sellers to the buyer, who paid to the sellers an instalment of the price. The machine did not work satisfactorily, and the buyer brought an action against the sellers in the county court claiming, *inter alia,* damages for breach of an implied warranty that the machine was fit for the purpose for which it was sold. The sellers pleaded, *inter alia,* that the contract expressly provided for the exclusion of all implied warranties. The buyer replied that at the time when she signed the order form she had not read it and knew nothing of its contents, and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyers as to the terms of the contract. Reversing the judgment of the county court judge, the divisional court (Scrutton & Maugham LJJ) held that as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents; and that the action failed and the sellers were entitled to judgment. As demonstrated, the facts in *L'Estrange v. F. Graucob, Limited (supra)* were poles apart: it was not a case involving a purchase of a piece of land nor was it a case involving a chargor-chargee relationship nor was it a case involving a *bona fide* purchaser for value whose right was subservient to a registered chargee.

The case of *Pao On and Others v. Lau Yiu Long and Others* [1980] AC 614 PC was also cited to drive home the point that the plaintiff signed the S & P agreement in the presence of lawyers and he should know what he had signed. In the present appeal, at no point of time did the plaintiff say or aver that he did not know what he was signing. The plaintiff in the present appeal was very cautious as he knew the pitfalls of paying the balance of the purchase price in the absence of a disclaimer letter from the Bank of Commerce. Moreover, the facts in *Pao On's* case *(supra)* revolved on the agreement to indemnify on threat of repudiation of contract with a third party; it also decided on the questions of whether the agreement was contrary to public policy and whether economic duress vitiated the consent that was given by the defendants in entering into a guarantee by way of an indemnity. Lord Scarman delivering the decision of the Privy Council was of the view that, although the defendants had been subjected to commercial pressure, the facts disclosed that they had not been coerced into the contract of guarantee and, therefore, the contract was not voidable on the ground of duress; that, in the absence of duress, public policy did not require a contract negotiated at arm's length to be invalidated because a party had either threatened to repudiate an existing contractual

obligation or had unfairly used his dominant bargaining position in negotiating the agreement and that, therefore, the defendants, having failed to show that the contract of guarantee was either invalid or voidable, were bound by its terms.

Conclusion

The end result was obvious. The appeal in encl. 12 was allowed with costs. An additional order was also made and that was to give priority to this case for open court hearing.